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In the

Supreme Court of the United States

OCTOBER TERM, 1942

No. 180

SOUTHWESTERN GREYHOUND LINES, INC.,
Petitioner,

v.

A. L. BUCHANAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fifth Circuit

and

BRIEF IN SUPPORT THEREOF

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To the Honorable the Supreme Court of the United States:

Comes now Southwestern Greyhound Lines, Inc., petitioner, and prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit affirming the judgment of the District Court of the United States for the Northern District of Texas at Abilene, in which a settlement agreement covering a personal injury claim was set aside and additional damages awarded, and petitioner respectfully shows:

SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED

In this case, for the first time in the history of Texas Jurisprudence, a jury was permitted to set a release aside

for "fraud" if it believed to be incorrect the opinion of a physician employed by the **releasor,** and not alleged to have had any connection with the releasee. The decision is far-reaching in its necessary effect upon the future of compromise settlements. It marks a departure from the past policy of Texas law favoring and encouraging compromises—for if a release can be set aside whenever the extent of the injuries as estimated by the physician employed by the **releasor** at the time of the settlement is less than the extent of injuries as testified to by another physician employed by the **releasor** at the time of a trial, releases in most instances become utterly valueless, and there is left no incentive to compromise.

Neither bad faith nor mutual mistake is involved in the case. The facts, briefly, are:

Respondent's wife sustained injuries in an automobile collision with petitioner's bus near Albany, Texas, on January 7, 1939. She was riding in a private car with her sister, a Mrs. Brice, at whose home she was visiting (R. 157). Mrs. Brice lived in Albany and her family physician there was a Dr. D. G. Curb (R. 95). Because he was the Brice family physician, Dr. Curb was called upon to examine and treat both Mrs. Brice and respondent's wife (R. 95). They were attended by Dr. Curb at his office in Albany on the night of the accident, which was Saturday, January 7th (R. 437). On Sunday, January 8th, Dr. Curb visited and attended respondent's wife at Mrs. Brice's home (R. 439). On Monday, January 9th, a claim agent of petitioner by the name of Massey, who was investigating the accident, called on Dr. Curb and asked for and received reports, both oral and written, covering the injuries sus-

tained by respondent's wife and Mrs. Brice (R. 512). On the same day he called on respondent's wife and Mrs. Brice and asked for and received statements from them (R. 198, 514). Settlements were not discussed at that time (R. 514).

In Dr. Curb's report relative to respondent's wife he stated in substance, both orally and in writing, that her injuries were not serious and that she would recover in a short time (R. 591-2). Claim Agent Massey advised respondent's wife of his conversation with her doctor, and that the doctor had stated that her injuries were not serious and that she would be all right in a short time (R. 172). He likewise advised respondent of Dr. Curb's opinion the following Wednesday, January 11th, when settlement negotiations were entered into (R. 516). Dr. Curb prior to his conversation with Massey on January 9th, had advised respondent's wife to the same effect, namely that "she would be well as ever in a few days and that in (his) opinion her injuries were trivial" (R. 471-2). Respondent offered testimony (and the matter is not here disputed) that after quoting Dr. Curb, Massey added his own assurances to the effect that the injuries sustained by respondent's wife were not serious and that she would be all right in a short time (R. 319).

On the morning of January 11th, a settlement was discussed by Massey and respondent. Massey's offer to pay the doctor bill and twenty-five dollars additional was rejected, but respondent's counter offer (R. 324) to accept fifty dollars plus the doctor bill was agreed upon; and that afternoon respondent and his wife executed a release (R. 588). Petitioner's check, which recited that it

was in full settlement of any claims against petitioner for injuries sustained by respondent's wife, was endorsed by respondent and his wife and was cashed on January 17, 1939 (R. 590).

Approximately a year and a half later, in a suit instituted by respondent against petitioner in the State District Court of Shackelford County, Texas, the release was attacked in a trial then had, but petitioner's motion for an instructed verdict was sustained and judgment was rendered for petitioner (R. 32). On a motion by respondent, however, the judgment was set aside and respondent was permitted to take a non-suit (R. 34). Thereafter this suit was filed in the United States District Court at Abilene, Texas, in a second attempt to set aside the release for alleged fraud (R. 1-25). While other grounds for setting aside the release were contained in the petition, they were rejected by the trial court, the jury being charged only upon the issue of fraud (R. 609-10).

The trial court charged the jury that it could set aside the release for fraud, regardless of the honesty and good faith of the representations made:

(1) If claim agent Massey's statement that Dr. Curb had said respondent's wife was not seriously hurt and would be all right in a short time, was untrue (R. 607) (the court perhaps also intending for the jury to consider Massey's own assurances to the same effect), or

(2) If Dr. Curb's statements to Massey that respondent's wife was not seriously hurt and would be all right in a short time were untrue[1] (R. 608).

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[1] See Point II, page 24 of Supporting Brief for a more complete analysis of the trial court's charge.

It is undisputed that the statements were made.

Subdivision (1) above of the court's charge submitted nothing of substance. Neither the repetition by Massey of a statement made by Dr. Curb (if the repetition was accurate), nor the expression of his own (a layman's) opinion, could meet even the first, universally recognized test of fraud: "a **false** representation of a material **fact.**" The trial court's charge in this connection appears to relate solely to the repetition of Dr. Curb's statement, for the court charged (R. 607): "* * * about the fourth day after the injury, [it is said] that the defendant's agent, Massey, called upon her [respondent's wife] and stated in part to her that, 'I am surprised to find you in bed, from what your doctor has said about you I would have imagined that you would be up from your injuries; that your injuries are not permanent and that you should be up and well in a short time.'" The court then charged the jury to find whether the statements were true or untrue. This charge does not appear to make any reference to Massey's own views; but if it was intended to include such views, it would make no difference. Massey's views, at best, constituted not a statement of **fact** but a statement of **opinion,** based on the same or less information than respondent and his wife had. While the Texas courts have under some circumstances (see Supporting Brief attached) held that the statement of a releasee's physician, because of his specialized training and presumably discerning examination, may be considered a statement of fact as distinguished from a statement of opinion, no Texas court (or any other court so far as we know) has ever suggested that the

statement of a layman as to a claimant's condition could ever be considered a statement of **fact.**

As to Massey's statement concerning what Dr. Curb had told him, the record is undisputed that Dr. Curb did tell Massey exactly what Massey told respondent (R. 591-2: Dr. Curb's written report to Massey; also R. 442-3; R. 471-2; R. 172). It has never been claimed by either petitioner or respondent that Dr. Curb **did not** tell Massey that respondent's wife was not seriously hurt and would be all right in a short time. It is not claimed by respondent that Massey quoted Dr. Curb incorrectly. Since the correctness of Massey's repetition of what Dr. Curb said is not questioned, and since Massey's own view, even if included in the court's charge, was at best the opinion of a layman, the aforesaid primary requirement of fraud, namely that the representation relied upon be "a **false** representation of **fact**" is wholly lacking here. And so we merely get back to the basic issue, set forth in the first paragraph of this Summary and Statement and covered by subdivision (2) above of the trial court's charge: **Can Dr. Curb's opinion itself be made the basis of fraud?**

This is the real core of the law suit. Whether the jury undertook to return a verdict under the court's direct charge with reference to fraud on the part of Dr. Curb (R. 608) or under the charge relating to Massey's statement as to what Dr. Curb had said (R. 607), the issue necessarily turned on whether or not the jury believed that Dr. Curb had made a mis-statement. Obviously the jury could not have found that Dr. Curb **did not** make a mis-statement but that Massey **did**—for Massey is not charged by respondent with having said any more or anything

other than what Dr. Curb said. But even assuming that the verdict might have been based on subdivision (1) of the court's charge rather than subdivision (2) thereof, nevertheless the jury was definitely instructed, in subdivision (2) above of the court's charge, that if it believed Dr. Curb had made a mis-statement, it should set aside the release and return a verdict for respondent. Under such instruction, the jury was **required** to return a verdict against petitioner if it believed Dr. Curb had made a mis-statement, even though it also believed that petitioner was in no wise responsible for such mis-statement. **Such charge of the court ignored the total absence of either pleading or proof upon which responsibility on petitioner's part for the statements of Dr. Curb could be based.**

It was neither alleged nor proved that Dr. Curb was employed by petitioner. On the contrary, it was undisputed that Dr. Curb was employed by respondent's wife. Respondent's petition described Dr. Curb as his wife's "attending physician" (R. 10-11). When Dr. Curb was employed by respondent's wife to attend her, he had had no contact or connection of any kind with petitioner (R. 441, 485). His employment by respondent's wife grew out of the fact that he had for many years been her sister's family physician (R. 95); he was the physician in attendance upon both her sister and herself (R. 437).

No question of bad faith on Dr. Curb's part was raised either in the pleadings or the evidence. It was his honest opinion at the outset that the injuries were not serious, and that remained his opinion at the time of the trial almost two years later (R. 442), although on the latter date

he believed respondent's wife to be seriously ill from tuberculosis, unrelated to the accident (R. 391).

No character of collusion between Dr. Curb and petitioner was charged in respondent's petition or submitted to the jury.

This is simply a case, without precedent though it be, in which a jury was permitted to set aside a release for fraud based upon the opinion of the **releasor's** physician. While statements made by a **releasee's** physician have sometimes been made the basis of fraud in setting aside releases, we know of no case other than this one in which a release has been set aside for fraud based upon the statements or representations of a **releasor's** own physician.

The Circuit Court affirmed the judgment in this case upon the theory that the trial judge charged the jury that if respondent "believed that the doctor [Dr. Curb] was acting not merely for plaintiff alone but for both parties, he would be bound by the release." The Circuit Court held that such charge protected petitioner in that it "covered" petitioner's requested charge that respondent could not recover if Dr. Curb was employed by and was the agent of respondent and not petitioner. This latter holding, which we would describe as a secondary error, is challenged in detail in the Supporting Brief attached hereto. The primary error, petitioner submits with all deference to the Circuit Court but without any qualification whatever, arises from the fact that the trial judge **did not so charge the jury.** We would not think of making such a dogmatic statement if there were the slightest possibility that we

might fail in the proper place hereinafter[2] to make entirely clear to this Court that no such charge was given by the trial judge. Furthermore, such theory of the Circuit Court, upon which the trial court's charge was approved (i. e. that respondent could not recover if he believed that Dr. Curb was acting for both parties instead of for respondent alone) was not even raised in the case: it was not alleged nor suggested anywhere in respondent's petition or in petitioner's answer; it was not raised by the evidence; it was not asserted or mentioned by either party in the briefs filed in the Circuit Court; and certainly it was not contained in the trial court's charge. We believe respondent will concede the correctness of this statement.

The trial court actually charged the jury that if Dr. Curb was acting for both parties, respondent **could** recover. This was error. The trial court further charged the jury that if Dr. Curb was acting for **either** party, respondent **could** recover. This was further error. Such charge as given by the court was the exact opposite of petitioner's requested charge. Under the law as thus given to the jury, the latter had no other alternative than to set aside the release for fraud if it believed Dr. Curb's opinion to have been incorrect, without regard to any responsibility on petitioner's part for such opinion. **It is this appalling and far-reaching error of law, permitting the vitiating of a release for fraud based upon the opinion of releasor's own physician, that is here challenged most earnestly by petitioner.**

In the Supporting Brief attached hereto, petitioner has undertaken to demonstrate, by reference to the applicable

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[2] See Point III, page 30 of Supporting Brief.

authorities, that there is no basis upon which this case could properly have been submitted to a jury, and that the judgment entered herein should be reversed and rendered against respondent; and in the alternative (but only in the alternative) that if under any theory it was proper for the jury to find that respondent was misled by the statements and representations of Dr. Curb, the jury should have been charged, as specially requested in writing by petitioner (R. 612), that respondent could not set aside the release and recover from petitioner if Dr. Curb was employed by and was the agent of the respondent, instead of being charged, as it actually was by the trial court, that respondent could recover if Dr. Curb was acting for either party or both parties.

STATEMENT OF THE BASIS FOR JURISDICTION

(a) The jurisdiction of this Court is based upon Section 240(a) of the Judicial Code as Amended by the Act of February 13, 1925, 28 U. S. C. A. 347(a).

(b) The nature of the case and the rulings below are such as to bring the case within the jurisdictional provisions cited, and within the provisions of Rule 38, paragraph 5, as set out herein under the heading "Reasons Relied on for Allowance of the Writ."

(c) The judgment of the Circuit Court of Appeals for the Fifth Circuit sought to be reviewed was entered February 24, 1942 (R. 699). A petition for rehearing was filed within the time allowed by the Rules of said Circuit Court of Appeals and was denied May 14, 1942 (R. 776).

QUESTIONS PRESENTED

1. Whether representations of a releasor's physician may be made the basis of fraud on the part of releasee so as to vitiate a release.

2. Whether a truthful repetition by releasee's claim agent of the opinion of the releasor's physician, coupled with the concurring opinion of such claim agent, may be made the basis of fraud on the part of the releasee so as to vitiate a release.

3. Whether the representations of a physician with reference to the extent of injuries may be made the basis of fraud on the part of the releasee so as to vitiate a release in the absence of a finding that such physician was employed by and was the agent of the releasee.

4. Whether a circuit court may affirm a judgment upon a theory or proposition wholly foreign to the case as tried, not raised or supported by pleading or evidence.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. **Conflict with Applicable Local Decisions.** In permitting a release to be set aside for fraud based upon statements and representations made by the attending physician for respondent's wife, employed by her and having no connection with petitioner, the decision in this case, involving an important question of local law, is in conflict with the applicable decisions of the courts of Texas. The latest applicable Texas decision, **Lipscomb v. Houston**

Electric Co., 149 S. W. (2d) 1042 (March 27, 1941) states the law in Texas briefly but clearly:

> "It seems to be the settled law in this State that in order to avoid the effect of a release on the ground of misrepresentation or fraud on the part of physicians, the releasor must show that the physician was employed by the releasee, since otherwise the latter would not be responsible for their representations and advice."

It is highly important that the wise policy of the Texas courts in looking with favor and approval upon compromises and in encouraging the settlement of disputes be not jeopardized by a doctrine that would permit a settlement to be set aside merely because the physician attending the claimant at the time of a settlement considered the injuries less serious than did a physician employed thereafter and testifying at the trial (thereby furnishing the basis of a finding that the opinion of claimant's attending physician at the time of the settlement was incorrect).

2. **Conflict with Decision of Another Circuit Court.** In affirming a judgment permitting the cancellation of a release for fraud based upon the statements of the releasor's physician, the Circuit Court has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of **Sitchon v. American Export Lines**, 113 Fed. (2d) 830. In the latter case the court upheld a settlement made by a seaman because it was made upon the advice of his own doctor and lawyer, even though another physician later found a fracture of his skull which would result in permanent disability. The court in that case pointed out the difference

between the situation involved therein and one in which the releasor may have acted upon the advice of the physician of releasee, holding (page 832):

> "If such a settlement as the one in the case at bar is voidable, no release by a seaman could ever be free from attack, if he subsequently discovered that his injuries were greater than he anticipated when executing the release."

In the **Sitchon** case the claimant described the situation arising out of the mis-statement or understatement of his own physician as a "mutual mistake." In the instant suit respondent describes the situation arising out of the mis-statement or understatement of his own physician, Dr. Curb, as "fraud." The name by which a claimant chooses to designate such a mis-statement or understatement cannot be effective to destroy the principle of law that a mis-statement or understatement of releasor's physician cannot be used to set aside a release.

3. **Departure from Accepted Course of Judicial Proceedings.** The Circuit Court in this case departed from the accepted and usual course of judicial proceedings in that it affirmed the judgment of the trial court upon a proposition or theory that was never in the case from the time respondent filed his petition until the time of the opinion of the Circuit Court. The Circuit Court held that the law of Texas was set forth in a charge that if respondent "believed that the doctor was acting not merely for the plaintiff alone but for both parties, he would be bound by the release." Without regard to whether or not that is the "law of Texas," such a charge was never given in this case. If it had been given, it would have been un-

supported by evidence. If evidence thereon had been offered, it would have been unsupported by pleadings. Petitioner was never afforded an opportunity to defend itself against the theory that the release would not be binding if respondent believed that the doctor was acting for respondent alone, as no such belief on the part of respondent was alleged and no proof relating thereto was offered. That the trial court's charge did not remotely suggest such theory is fully developed in the Supporting Brief attached hereto. Petitioner respectfully submits that the action of the Circuit Court in deciding the case upon a theory not raised or involved therein is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue in this cause to the United States Circuit Court of Appeals for the Fifth Circuit, and that upon hearing by this Honorable Court the judgment of said United States Circuit Court of Appeals for the Fifth Circuit be reversed; and that petitioner have such other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted,

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